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No. 07-350

IN THE

Supreme Court of the United States

RICHARD BROWN,

Petitioner,

v.

FRANK MCKITHEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PAUL A. ENGELMAYER
Counsel of Record
CHRISTOPHER J. MEADE
JANET R. CARTER
ANNE K. SMALL
JULIA M. LIPEZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

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BRIEF IN OPPOSITION

Petitioner asks the Court to grant certiorari to decide whether a suit seeking access to evidence for DNA testing falls into the exception to Section 1983 established by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and their progeny. There was once a shallow circuit split on that issue: the Eleventh Circuit held that such suits are not barred by *Heck* while the Fourth and Fifth Circuits reached the opposite conclusion. That split, however, did not survive *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005). After *Dotson*, as the Second Circuit explained in the decision below, the approach taken by the Fourth and Fifth Circuits is "no longer tenable." Pet. App. 28a n.15. Moreover, in an "emerging consensus," *id.*, every circuit to have weighed in on the question since *Dotson* has concluded that a suit like McKithen's may proceed under Section 1983. The petition for certiorari should be denied.

STATEMENT

1. Section 1983 provides a cause of action for anyone subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. 42 U.S.C. § 1983. A habeas corpus suit typically also alleges that a state actor—the prisoner's custodian—is causing a deprivation of rights by subjecting the prisoner to continued incarceration in violation of the Constitution. *See* 28 U.S.C. § 2254(a). Consequently, most habeas corpus challenges will also, prima facie, state a claim under Section 1983. Habeas corpus, however, is subject to familiar preconditions and limitations—including exhaustion of state remedies—that do not apply to Section 1983. Aware that prisoners with habeas corpus challenges could circumvent these restrictions by styling their suits as Section 1983 actions, this Court announced an exception to Section 1983 in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). It held that the claims of the prisoners in that case—alleging "illegal physical confinement" and requesting relief that would result in "release from physical custody"—could only be brought in habeas. *Id.* at 487, 500.

In *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court further developed the test for distinguishing cases that must be brought in habeas from those permitted under Section 1983. The prisoner in *Heck* sued prosecutors and a police investigator for damages while his state-court conviction was still pending on direct appeal. He alleged that the defendants had conducted an unlawful investigation leading to his arrest, had knowingly destroyed exculpatory evidence, and had used an illegal voice identification procedure at his trial. *Id.* at 479. Taking as established that these claims "challeng[ed] the legality of his conviction," *id.* at 480 n.2, the Court affirmed the district court's dismissal of the action and held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the

conviction or sentence has already been invalidated." *Id.* at 487. To illustrate, the Court noted that a claim seeking damages for an allegedly unreasonable search and seizure may be brought under Section 1983 because, in light of "doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful." *Id.* at 487 n.7 (citations omitted; emphasis in original).

2. In 2002, with *Heck* as their key guidepost, three circuits considered whether a suit seeking access to evidence for DNA testing was cognizable under Section 1983. Applying the plain terms of the *Heck* test, the Eleventh Circuit concluded that such a suit was cognizable. *See Bradley* v. *Pryor*, 305 F.3d 1287 (11th Cir. 2002). The court observed that *Heck* turns only on whether success "necessarily impl[ies]" invalidity of the conviction or sentence. *Id.* at 1291 (quoting *Heck*, 512 U.S. at 487). Because a plaintiff prevails in a suit seeking access to evidence for DNA testing "once he has access to th[e] evidence or an accounting for its absence," and because "[n]othing in that result necessarily demonstrates or even implies that his conviction is invalid," *Heck* was no bar. *Id.* at 1290.

Two other circuits reached a different result. The Fourth Circuit, divided 2-1 on this issue, addressed the *Heck* question by focusing on the plaintiff's ultimate purpose:

> Harvey['s] . . . attempt to avoid *Heck* fails. [He] is seeking access to DNA evidence for one reason and one reason only—as the first step in undermining his conviction. He believes that the DNA test results will be favorable and will allow him to bring a subsequent motion to invalidate his conviction.

Harvey v. *Horan*, 278 F.3d 370, 375 (4th Cir. 2002) (*Harvey I*).[1] The Fifth Circuit adopted that reasoning in a brief per

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[1] As the court below explained, "[s]ubsequent developments appear to have made it impossible for the Fourth Circuit to reconsider the *Har-*

curiam decision. *See Kutzner* v. *Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002).[2]

3. Two years later, the Court was asked to clarify the breadth of the exception to Section 1983 in a related context. A circuit split had emerged over whether *Heck* barred a Section 1983 suit that challenged the constitutionality of parole procedures and sought new, properly-conducted procedures, but did not challenge the *result* of the parole hearing—the denial of parole. The unsuccessful state officials in one of these cases, *Dotson* v. *Wilkinson*, 329 F.3d 463 (6th Cir. 2003) (en banc), petitioned for certiorari. They argued that, by clarifying the scope of *Heck*, the Court would not only resolve the parole-hearing split but also provide guidance on, *inter alia*, the DNA-evidence split. *See* Pet. 27-28, *Wilkinson* v. *Dotson*, No. 03-287 (Aug. 18, 2003). The petition described the split between the Eleventh and Fourth Circuits and observed that "[a]t the root of [this] conflict[] is a disagreement about the scope of *Heck*'s 'necessarily im-

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vey I panel's decision." Pet. App. 19a n.10. After Harvey petitioned for rehearing en banc, a Virginia court ordered, pursuant to state law, that he be allowed to have the evidence subjected to DNA testing. *See Harvey* v. *Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (*Harvey II*) (Luttig, J., respecting the denial of rehearing en banc). Concluding that this action mooted the rehearing petition, Judge Luttig nevertheless filed an opinion explaining his view that a suit like Harvey's must be permitted under Section 1983 (and calling the panel majority's contrary conclusion "fairly clearly" wrong). *See id.* at 304, 307-08 ("I do not believe it even arguable that a post-conviction action merely to permit access to evidence for the purpose of . . . DNA testing 'necessarily implies' invalidity of the underlying conviction.").

[2] After the Eleventh Circuit's decision in *Bradley*, holding that *Heck* did not bar the plaintiff's suit, the Alabama Attorney General petitioned for certiorari. He argued that review was warranted by the Eleventh Circuit's disagreement with the Fourth and Fifth Circuits. *See* Pet. 13, *Pryor* v. *Bradley*, No. 02-1237 (Feb. 20, 2003). This Court denied certiorari. *Pryor* v. *Bradley*, 538 U.S. 999 (2003).

plies' language. Granting certiorari here would thus assist the circuits in resolving [this] conflict[] as well." *Id.*[3]

This Court granted certiorari and reaffirmed that *Heck* does not bar a Section 1983 suit unless success in that suit would *necessarily* imply the invalidity of the conviction or sentence. It summarized *Preiser* and its progeny as follows: "These cases, taken together, indicate that a state prisoner's § 1983 action is barred ... —no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson* v. *Dotson*, 544 U.S. 74, 81-82 (2005) (emphasis in original). Applying that test, the Court concluded that the two respondents' Section 1983 suits were allowable because "a favorable judgment will not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s].'" *Id.* at 82 (quoting *Heck*, 512 U.S. at 487 (alteration in *Dotson*)). Rather, success for one prisoner "means at most new eligibility review, which at most will speed *consideration* of a new parole application," *id.*; and, for the other, it "means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten [the] prison term," *id.* In other words, "[b]ecause neither prisoner's claim would necessarily spell speedier release, neither lies at

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[3] An amicus curiae group of sixteen States—led by Alabama, whose officials were the losing parties in *Bradley* (the Eleventh Circuit decision that permitted a DNA-evidence suit to proceed under Section 1983)—connected *Dotson* even more directly to the DNA-evidence cases. At the petition stage, they urged the Court to grant certiorari to resolve "lingering questions" regarding the scope of *Heck*, stressing among those questions the split between *Bradley* and the Fourth Circuit's decision in *Harvey I*. States of Alabama, et al., Amicus Pet. 2, 4-7, 11, *Wilkinson* v. *Dotson*, No. 03-287 (Sept. 22, 2003). And at the merits stage, they acknowledged that the *Dotson* question and the DNA question went hand in hand. States of Alabama, et al., Amicus Br. 7-8 n.1, *Wilkinson* v. *Dotson*, No. 03-287 (July 19, 2004) (urging Court to adopt *Harvey I*'s reasoning and hold that any suit is *Heck*-barred if it was brought "as the first step toward" gaining earlier release).

'the core of habeas corpus.'" *Id.* (quoting *Preiser*, 411 U.S. at 489).

This Court specifically rejected the argument that the suit was barred by *Heck* merely because it was a first step in a process that the prisoners hoped would lead to an early release. It noted the State's contention that the suits were barred "because [the prisoners] believe that victory on their claims will lead to speedier release from prison," 544 U.S. at 78, and announced:

> The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). [But] the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.

Id. Thus, the fact that release might be a prisoner's ultimate goal does not preclude that prisoner from bringing a Section 1983 claim "where success in the civil rights suit would not necessarily vitiate the legality of . . . state confinement." *Id.* at 81.

4. Following *Dotson*, three courts of appeals have addressed the question presented, and all three concluded that *Heck* is no bar to a Section 1983 suit seeking evidence for DNA testing. First, in *Osborne* v. *District Attorney's Office for the Third Judicial District*, 423 F.3d 1050, 1054-55 (9th Cir. 2005), the Ninth Circuit analyzed the decisions of the Fourth, Fifth and Eleventh Circuits, and concluded that only *Bradley*—the Eleventh Circuit decision permitting a suit like McKithen's to proceed under Section 1983—had correctly applied *Heck*'s "necessarily implies" test. "Any remaining doubt as to the propriety" of *Bradley*'s approach, the court continued, was "removed . . . by the Court's recent opinion in *Dotson*, which reads 'necessarily' to mean 'inevitably' and rejects the notion that a claim which *can* be brought in habeas *must* be brought in habeas." *Osborne*, 423

F.3d at 1055 (emphasis in original). Next, the Seventh Circuit reached the same result. *See Savory* v. *Lyons*, 469 F.3d 667, 671-72 (7th Cir. 2006) (concluding that suit was cognizable under Section 1983 because "[t]he exception to § 1983 jurisdiction is a narrow one" and "Savory will not be released from prison, nor will his sentence be shortened, if he successfully gains access to physical evidence for DNA testing"). Finally, in the decision below, the Second Circuit agreed with the Seventh and Ninth Circuits, as well as with the earlier Eleventh Circuit decision.

5. Respondent Frank McKithen was convicted in May 1993 of attempted murder and related offenses. The victim was McKithen's estranged wife, Rose McKithen. At trial, she identified McKithen as her assailant and identified a kitchen knife shown to the jury as the weapon he used to stab her. The victim was the only eyewitness to the stabbing itself. McKithen did not present any witnesses or evidence and instead simply argued that the prosecution had failed to carry its burden of establishing beyond a reasonable doubt that he was the assailant.[4] The jury found McKithen guilty, and his conviction was affirmed on direct appeal. *People* v. *McKithen*, 634 N.Y.S.2d 128 (App. Div. 1995). The Court of Appeals denied review. *People* v. *McKithen*, 668 N.E.2d 427 (N.Y. 1996).

In 2001, McKithen moved in New York State court for an order compelling the State to perform DNA testing on the knife that had been admitted into evidence at his trial. He brought his claim, pro se, pursuant to a New York statute granting a limited right to forensic DNA testing. *See* N.Y. Crim. Proc. Law § 440.30(1–a)(a) (court should order

[4] Petitioner baselessly insists that McKithen "never claimed misidentification of himself." Pet. 7. In the same sentence, petitioner states that McKithen never denied that the victim suffered a stab wound. *Id.* Maintaining innocence while acknowledging that the victim was stabbed amounts to the position that another person was the assailant (or that the wound was self-inflicted)—and thus that the victim did not testify truthfully when she said that it was McKithen who stabbed her.

DNA testing of evidence if it determines "that if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant"). The State court held that this standard was not satisfied in McKithen's case and denied relief. *People* v. *McKithen*, Indict. No. 3964/92 (N.Y. Sup. Ct. Queens County Nov. 8, 2001) (Mem.). The Appellate Division denied leave to appeal. *People* v. *McKithen*, No. 2001-10847 (App. Div. Feb. 13, 2002).

6. In 2002, again proceeding pro se, McKithen filed a Section 1983 action in federal district court alleging that petitioner had violated his constitutional post-conviction right to access evidence for DNA testing. Petitioner moved to dismiss the claim on four grounds: (1) the district court lacked jurisdiction under *Rooker-Feldman*; (2) McKithen's claim was collaterally estopped in light of the earlier State court determination denying the Section 440.30 motion; (3) McKithen was precluded by *Heck* from proceeding under Section 1983; and (4) in any event, McKithen had failed to allege a violation of any legitimate constitutional right. *See McKithen* v. *Brown*, No. 02-CV-1670, slip op. 2 (E.D.N.Y. Mar. 28, 2003) (Report & Recommendation of Bloom, M.J.). The district court, accepting the recommendation of a magistrate judge, dismissed the complaint under *Rooker-Feldman* alone. *McKithen* v. *Brown*, No. 02-CV-1670 (E.D.N.Y. Apr. 18, 2003).

McKithen appealed, and the Second Circuit reversed. It held that the broad interpretation of *Rooker-Feldman* applied by the district court had not survived *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, 544 U.S. 280 (2005). *See* Pet. App. 10a-17a. It then rejected petitioner's res judicata argument, and left the collateral estoppel argument for the district court to consider on remand. *Id.* 28a-33a. Petitioner does not challenge any of these rulings.

The Second Circuit also rejected petitioner's argument that *Heck* stood as a bar to McKithen's Section 1983 suit. It observed that the bar applies only when success in the suit

"necessarily" demonstrates the invalidity of the conviction or sentence. Pet. App. 19a-26a. Success in McKithen's suit, by contrast, would result only in "an injunction requiring that the knife be made available for DNA testing"—and "[s]uch testing . . . *'necessarily* implies nothing at all about the plaintiff's conviction.'" *Id.* 26a (quoting *Harvey* v. *Horan*, 285 F.3d 298, 308 (4th Cir. 2002) (*Harvey II*) (Luttig, J., respecting the denial of rehearing en banc) (emphasis in *Harvey II*). Success would not necessarily demonstrate the invalidity of his conviction or sentence, the court explained, for two reasons: first, the results of testing might be inculpatory, inconclusive, or insufficiently exculpatory. *Id.* Second, even if the results were exculpatory, McKithen would then have to present those results as the basis for relief in "an entirely separate lawsuit," presumably a habeas petition, in order to secure release from custody. *Id.* In so holding, the court noted that the Seventh, Ninth, and Eleventh Circuits had permitted prisoners to bring claims like McKithen's under Section 1983. *Id.* 18a.

The court observed that the Fourth and Fifth Circuits (and also the Sixth Circuit, in an unpublished decision, *Boyle* v. *Mayer*, 46 F. App'x 340 (6th Cir. 2002)) had, prior to *Dotson*, reached the opposite conclusion. Pet. App. 19a. But it stressed that the ground on which those circuits' decisions rested was rejected in *Dotson*: "[T]he Fourth Circuit (whose reasoning the Fifth Circuit—and, arguably, the Sixth Circuit—adopted shortly after *Harvey I* was decided) relied heavily on the assumed beliefs and motivations of the § 1983 plaintiff. This approach is no longer tenable after *Dotson*." *Id.* 27a-28a n.15 (citation omitted). Hence, it "comes as no surprise" that "courts in every circuit to have weighed in on the issue after *Dotson*," including the Seventh and Ninth Circuits, "have rejected *Harvey I*, and instead sided with the Eleventh Circuit. Today we join this emerging consensus." *Id.* 28a n.15.

In addition to the question of collateral estoppel, the court left other significant issues for the district court to consider on remand. It declined to rule on the question of

the existence and the contours of a constitutional right of access to evidence for DNA testing, in light of the "fact-intensive nature of the inquiry," and "the need to approach the issue cautiously." *Id.* 34a.

REASONS FOR DENYING THE PETITION

In seeking certiorari, petitioner argues, first, that the decision below conflicts with decisions of the Fourth, Fifth, and Sixth Circuits, and, second, that it is incorrect under *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005). Neither argument has merit. To the extent that the circuit court cases on which petitioner relies did conflict with the decision below, *Dotson* rejected the grounds on which they rested. Any pre-*Dotson* circuit conflict is thus no longer viable—a point confirmed by the fact that all the courts of appeals to weigh in on the question since *Dotson* have agreed that suits like McKithen's are not barred by *Heck*. Petitioner is thus left seeking error correction where no error exists. Moreover, even if the issue warranted this Court's review, this case is a singularly poor vehicle. The Second Circuit left several potentially-dispositive issues for the district court to consider on remand, and an unfavorable decision on any one of those would moot the *Heck* question.

I. THERE IS NO ACTIVE CIRCUIT SPLIT ON THE QUESTION PRESENTED

Petitioner's claim of a circuit split disregards the impact of *Dotson*. Prior to *Dotson*, there was a 2-1 split. The Eleventh Circuit had applied *Heck*'s test without embellishment, asking whether success in a suit seeking access to evidence for DNA testing would necessarily imply the invalidity of the plaintiff's conviction or sentence. *See Bradley* v. *Pryor*, 305 F.3d 1287, 1290-91 (11th Cir. 2002), *cert. denied*, 538 U.S. 999 (2003). The Fourth and Fifth Circuits had engrafted onto *Heck* a new standard that focused not on the implications of success but rather on the plaintiff's ultimate purpose. *See Harvey* v. *Horan*, 278 F.3d 370, 375 (4th Cir. 2002) (*Harvey I*); *Kutzner* v. *Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002) (per curiam).

Dotson rejected the latter approach, confirming that the *Heck* exception to Section 1983 is as narrow as *Heck*'s language suggests and rejecting reliance on the plaintiff's ultimate purpose. Finding a Section 1983 suit barred by *Heck* simply because the plaintiff hoped that success would ultimately lead to earlier release, the Court held, amounted to "jump[ing] from a true premise . . . to a faulty conclusion." *Dotson*, 544 U.S. at 78. Moreover, it announced that holding despite being urged by several States to adopt the Fourth Circuit's ultimate-purpose analysis. *See* States of Alabama, et al., Amicus Br. 7-8 n.1, *Dotson*, No. 03-287 (July 19, 2004); *see also supra* n.3. Thus, as the Second Circuit pointed out, the approach taken by the Fourth and Fifth Circuits "is no longer tenable after *Dotson*." Pet. App. 28a n.15.[5]

The Fourth and Fifth Circuits do not yet appear to have considered the impact of *Dotson* on *Harvey I* or *Kutzner* (nor the Sixth Circuit its impact on *Boyle*). But, in light of *Dotson*'s clear mandate, there is no reason to conclude that they will adhere to their prior decisions when they do so.[6]

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[5] The decision below cited another case alongside the Fourth and Fifth Circuits' decisions: *Boyle* v. *Mayer*, 46 F. App'x 340 (6th Cir. 2002) (unpub.). However, *Boyle* was not properly part of the pre-*Dotson* circuit conflict. Aside from being unpublished, the court hedged between the unexplained assertion that "Boyle plainly challenged the validity of his criminal convictions and the fact or duration of his continued confinement" and the proviso that "insofar as [Boyle's] claims do not implicate the validity of his convictions, . . . [they] would not rise to the level of a constitutional violation" and so would not state a claim under Section 1983. *Id.* at 340-41. The court's conclusion was thus that the plaintiff lost *whether or not* his claims were barred by *Heck*. *Cf. Alley* v. *Key*, 431 F. Supp. 2d 790, 795 (W.D. Tenn. 2006) (whether Section 1983 suit seeking evidence for DNA testing is barred by *Heck* "appears to be one of first impression in this Circuit"). Moreover, even if *Boyle* really had sided with *Harvey I* and *Kutzner*, it was also undercut by *Dotson*, as the court below noted. *See* Pet. App. 27a 28a n.15.

[6] The Fifth Circuit has cited *Kutzner* for the relevant portion of its *Heck* discussion in one unpublished decision since *Dotson* was decided. *See Summers* v. *Eidson*, 206 F. App'x 321 (5th Cir. 2006), *application for stay of execution pending cert. denied*, No. 06A427 (Oct. 25, 2006). That decision did not discuss *Dotson*, and it did not reanimate the erstwhile

Indeed, *Dotson*'s impact is confirmed by the fact that every court of appeals to have weighed in on the question subsequently has concluded that *Heck* is no bar to a suit like McKithen's. *See Osborne* v. *District Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050, 1054-55 (9th Cir. 2005); *Savory* v. *Lyons*, 469 F.3d 667, 671-72 (7th Cir. 2006); Pet. App. 18a-27a. These cases establish an "emerging consensus." *Id.* 28a n.15. Accordingly, the circuit conflict that existed prior to *Dotson* is no longer viable and does not provide grounds for a grant of certiorari.

II. THE DECISION BELOW IS CORRECT

The Second Circuit's decision applied the plain terms of *Heck* and *Dotson* and correctly concluded that McKithen's suit may proceed under Section 1983. *Preiser*, *Heck* and

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split. Summers alleged in his Section 1983 suit that the prosecution had failed, during his trial, to disclose material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Although Summers only sought disclosure of the evidence, rather than his release from incarceration, success on that suit nevertheless necessarily would have demonstrated the invalidity of his conviction. That is so because in order to satisfy the materiality element of a *Brady* claim, an inmate must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion); *id.* at 685 (White, J., concurring in part and concurring in the judgment). And because showing an impact on the trial is an element of the claim, "once there has been *Bagley* error . . ., it cannot subsequently be found harmless." *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995). Consequently, establishing a constitutional violation under *Brady* would have required Summers to demonstrate every single element needed to show that his conviction was invalid.

The constitutional wrong alleged in McKithen's suit, by contrast, is a violation of his *post-conviction* right to access evidence for DNA testing. Demonstrating that he is entitled to such post-conviction access would not necessarily demonstrate that his conviction is invalid.

Finally, even if, contrary to fact, *Summers* conflicted with *Bradley* or with the uniform line of post-*Dotson*, DNA-testing decisions—*Osborne*, *Savory*, and *McKithen*—review would still not be warranted. *Summers* is unpublished and non-precedential, *see* 5th Cir. R. 47.5.4, and did not address the impact of *Dotson* on *Kutzner*.

their progeny only bar a Section 1983 action "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 82 (emphasis in original). If McKithen is successful in his suit, all he will win is access to the knife for purposes of subjecting it to DNA testing. That success demonstrates nothing at all about the validity of his conviction or sentence.

Petitioner acknowledges that *Dotson* is dispositive, Pet. 13-15, but he mistakenly believes that it resolves the issue presented in his favor. First, he maintains that the Second Circuit's decision "sever[s] the § 1983 petition from its ultimate objective." *Id.* 14. But *Dotson* specifically held that having release from incarceration as an ultimate goal does not bar a Section 1983 suit. *See* 544 U.S. at 78; *see also* Pet. App. 27a n.15 (the approach that focuses on "the plaintiff's motives in bringing the suit[] was laid to rest by the Supreme Court in *Dotson*"). Second, petitioner insists that, because McKithen's suit is "an initial step" in a path he hopes will end in his release from incarceration, his claim "lies at the 'core of habeas corpus.'" Pet. 16 (quoting *Preiser*, 411 U.S. at 489). But again, *Dotson* held precisely the opposite: "Because neither prisoner's claim would necessarily spell speedier release, neither lies at 'the core of habeas corpus.'" 544 U.S. at 82 (citations omitted); *see also id.* at 81 ("*Preiser* found an implied exception to § 1983's coverage where the claim seeks—not where it simply 'relates to'—'core' habeas corpus relief[.]"). *Dotson* resolves every aspect of petitioner's argument in McKithen's favor, leaving nothing to warrant this Court's review.

III. Even If The Question Presented Were Certworthy, This Case, In Its Current Posture, Is A Bad Vehicle

Were this Court inclined to consider the issue presented before the Fourth and Fifth Circuits confront *Dotson*'s impact, it should at least await a final decision to review. In the present case, the Second Circuit merely reversed the district court's grant of a motion to dismiss on jurisdictional grounds and remanded for consideration of four issues. It instructed the district court to determine whether

McKithen's claim is barred by collateral estoppel. It ordered the court to determine whether there is a constitutional right of access to evidence for DNA testing, and if so, to consider the standard for finding a constitutional deprivation. And it instructed the court to consider whether McKithen is constitutionally entitled to access the knife on the particular facts of his case. Pet. App. 32a-39a. An unfavorable answer on any one of those questions would obviate the issue of McKithen's ability to proceed under Section 1983. Conversely, if McKithen is successful in the district court and on appeal, the government will have another opportunity to seek this Court's review.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

PAUL A. ENGELMAYER
Counsel of Record
CHRISTOPHER J. MEADE
JANET R. CARTER
ANNE K. SMALL
JULIA M. LIPEZ
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

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